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RECEIVED

MAR 30 1992

Federal Communications Commission  
Office of the Secretary

March 30, 1992

\*NOT ADMITTED IN D.C.

Ms. Donna R. Searcy, Secretary  
Federal Communications Commission  
1919 M Street, N.W. -- Room 222  
Washington, DC 20554

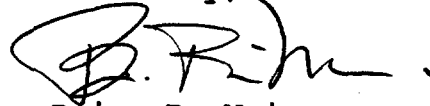
Re: CC Docket No. 92-13

Dear Ms. Searcy:

Enclosed for filing in the above proceeding are the "Comments of the International Communications Association" (ICA). ICA is filing these Comments in response to the Commission's Notice of Proposed Rulemaking, FCC 92-35, released January 28, 1992, and their acceptance is respectfully requested.

To acknowledge the Commission's receipt of these documents, please place the Commission's stamp on the enclosed duplicate original and remit the same to bearer.

Sincerely,



Brian R. Moir

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BEFORE THE  
Federal Communications Commission

WASHINGTON, D.C.

ORIGINAL  
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MAR 30 1992

Federal Communications Commission  
Office of the Secretary

In the Matter of	)	
	)	
Tariff Filing Requirements for	)	CC Docket No. 92-13
Interstate Common Carriers	)	
	)	

COMMENTS OF THE  
INTERNATIONAL COMMUNICATIONS ASSOCIATION

The International Communications Association ("ICA"), by its attorneys, hereby submits its initial comments on the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-referenced proceeding.<sup>1/</sup> In the Notice, the Commission seeks comments on the lawfulness and future application of its long-standing policy under which the Commission forbears from requiring nondominant interexchange carriers ("IXCs") from filing interstate tariffs.<sup>2/</sup> As discussed below, ICA suggests that the Commission has the statutory authority to forbear from requiring nondominant IXCs from filing interstate tariffs and that the continuation of this policy is in the public interest.

ICA is the largest association of telecommunications users in the world, with more than 720 members who spend at least \$1 million

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<sup>1/</sup> Notice of Proposed Rulemaking, CC Docket No. 92-13 (rel. January 28, 1992).

<sup>2/</sup> See Second Report and Order, CC Docket No. 79-252, 91 FCC 2d 59 (1982); Fourth Report and Order, CC Docket No. 79-252, 95 FCC 2d 554 (1983).

per year on the acquisition of telecommunications services and equipment. Recent estimates indicate ICA members' telecommunications expenditures total nearly \$21 billion per year.

For the past decade, ICA members have benefitted directly from the explosion in technology and increased competition in the telecommunications industry. These benefits include new and improved service offerings, more service suppliers, better service quality, and lower or stable prices for many services. Many of these benefits are a direct result of the Commission's policies that impose less regulation on nondominant carriers (i.e. those without market power) and maintain strict regulatory oversight over carriers that possess market power or control essential or bottleneck facilities. Accordingly, the Commission should not reverse its forbearance policy and impose tariff filing requirements on nondominant common carriers.

**I. The Commission has the authority under the Communications Act to permit nondominant carriers not to file tariffs.**

The Communications Act of 1934, provides the Commission with broad authority to carry out its mandate that the Commission make available to all peoples of the United States a rapid, efficient nationwide and worldwide telecommunication service with adequate facilities at reasonable charges. 47 U.S.C. 151. As such, the Commission may perform any acts, make such rules and regulations and issue such orders, not inconsistent with the Act, as may be necessary in the execution of its functions. 47 U.S.C. 154(i). There is significant judicial precedent upholding the Commission's

broad authority to adopt rules and regulations that consider the development of technology and new services not contemplated by the 1934 Act, including the authority to not regulate a service.<sup>3/</sup>

The Commission's broad authority extends to the Act's requirement that common carriers file tariffs. 47 U.S.C. 203. Specifically, Section 203(b)(2) states that "The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section . . . ." In addition, Section 203(c) states that carriers may not provide service until tariffs have been filed, "unless otherwise provided by or under authority of this Act." The authority to not file tariffs exists in Section 211(b), which contemplates that carriers may do business by contract or by tariff. Taken together, these sections provide substantial statutory authority for the Commission's decision to forbear from requiring nondominant carriers from filing tariffs.

Moreover, the Commission's forbearance policies are not affected by the Supreme Court's decision in Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 110 S.Ct. 2759 (1990). In Maislin, the Supreme Court solely addresses the scope of the "filed rate" doctrine, i.e. the requirement in the Interstate Commerce Act

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3/ See Philadelphia Television Broadcasting v. FCC, 359 F. 2d 282, 284 (D.C. Cir. 1966) ("expert agency entrusted with administration of a dynamic industry is entitled to latitude in coping with new developments in that industry"); See also FCC v. Pottsville Broadcasting, 390 U.S. 134 (1940); NBC v. United States, 314 U.S. 190 (1943); NARUC V. FCC, 525 F.2d 630 (D.C. Cir. 1976), cert denied, 425 U.S. 992 (1976).

that carriers offer service only pursuant to filed rates.<sup>4/</sup> The regulatory structure of the telecommunications industry is different than that of the transportation industry. The Commission has found that nondominant common carriers lack market power and thus tariff filings are not required to ensure just and reasonable rates. There is no record that the Interstate Commerce Commission ("ICC") has made a similar, broad finding with respect to competition in the transportation industry. In addition, the Interstate Commerce Act does not provide the ICC with the same broad authority with respect to tariffs that has been delegated to the Commission in Section 203 of the Communications Act. See 49 U.S.C. Sections 10761, 10762.

It is also noteworthy that in Maislin the Court stated that it is Congress's responsibility to modify or eliminate the ICC's tariff filing requirement and that Congress has chosen not to do so, though it has had the opportunity on numerous occasions. Maislin, 110 S.Ct. at 2770-71. To the contrary, Congress is aware of, and apparently acquiesces in the Commission's forbearance policy for nondominant carriers. Specifically, in 1990, Congress enacted the Telephone Operator Consumer Services Improvement Act of 1990 ("TOCSIA"), to address problems that Congress believed existed in the operator services industry. 47 U.S.C. 226. At the time the legislation was enacted, Congress knew that operator services

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4/ The Court stated that without provisions requiring filed rates it would be difficult to enforce the requirement that rates be reasonable and nondiscriminatory, and it would be virtually impossible for the public to assert its right to challenge the lawfulness of existing proposed rates. Id. at 2769.

providers would be regulated as nondominant common carriers and subject to the Commission's forbearance policy. In order to provide further oversight of the operator services industry, TOCSIA requires operator service providers to file with the Commission informational tariffs specifying rates, but states that the Commission may waive this requirement after four years following the date of enactment of the section. 47 U.S.C. 226(h)(1)(B). Thus, had Congress believed that the Commission did not have proper authority for its forbearance policy as it pertains to tariffs, it is unlikely that Congress would have permitted the FCC an opportunity in four years to extend that policy to operator service providers.

**II. The Commission's forbearance policy is in the public interest.**

There are numerous public interest benefits in maintaining the existing policy that the Commission forbear from requiring nondominant common carriers from filing tariffs. By not filing tariffs, nondominant common carriers are able to make rapid, efficient responses to changes in demand and cost; bargain with customers over rates and adjust rates quickly to market conditions; avoid petitions to reject or suspend tariffs that could be filed by competitors; and price competitively.<sup>5/</sup> On the other hand, there does not appear to be any detriment to users created by the forbearance policy.

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<sup>5/</sup> See Further Notice of Proposed Rulemaking, CC Docket No. 79-252, 84 FCC 2d 445,453-54 (1981).


**Conclusion**

WHEREFORE, for the above-stated reasons, ICA respectfully suggests that the Commission has the statutory authority to forebear from requiring nondominant IXCs from filing interstate tariffs and that the continuation of this policy is in the public interest.

Respectfully submitted,

INTERNATIONAL COMMUNICATIONS ASSOCIATION

By:



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Its Attorneys

March 30, 1992

**CERTIFICATE OF SERVICE**

I, Laura K. Higgins, hereby certify that a true and correct copy of the foregoing "Comments of the International Communications Association" was hand delivered, this 30th day of March, 1992, to the following:

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Commission  
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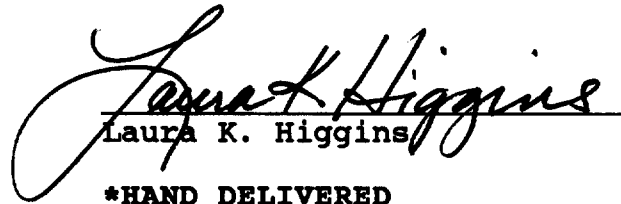
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